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# The Threat of the Wandering Poor: Welfare Parochialism and its Impact on the Use of Housing Mobility as an Anti-Poverty Strategy

## **Cover Page Footnote**

Professor of Law and Director, Public Interest Law Clinic, Washington College of Law of the American University. The author wishes to thank Robert P. Gajdys, Ruth Crystal, Barbara Samuels, Jane Conover and John Goering for providing valuable background and materials; Sheila O'Leary for her research assistance; and the Washington College of Law for its support.

# THE THREAT OF THE WANDERING POOR: WELFARE PAROCHIALISM AND ITS IMPACT ON THE USE OF HOUSING MOBILITY AS AN ANTI-POVERTY STRATEGY

Susan Bennett\*

## I. Introduction

At best, income and housing programs for poor people run on parallel tracks. Although reformers of the Progressive era saw bad housing and urban poverty as fatally meshed,<sup>1</sup> the nationalized housing goals<sup>2</sup> and nationalized income policy<sup>3</sup> developed during the New Deal shared little except their status as responses to the economic catastrophe of the Great Depression. That present-day commentators treat as novel the notion that federal housing policy might be part of a comprehensive anti-poverty strategy underscores the divergence between what we think of as poverty pol-

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1. See, e.g., JACOB RIIS, *HOW THE OTHER HALF LIVES* 2-3 (1957): "What the tenements are and how they grow to what they are, we shall see hereafter. . . they are the hot-beds of the epidemics that carry death to rich and poor alike; the nurseries of pauperism and crime that fill our jails and police courts; that throw off a scum of forty thousand human wrecks to the island asylums and workhouses year by year . . ."; see also CHARLES HOCH AND ROBERT A. SLAYTON, *NEW HOMELESS AND OLD* 62-64 (1989).

2. See ROBERT FISHER, *ORIGINS OF FEDERALLY AIDED PUBLIC HOUSING IN FEDERAL HOUSING POLICY & PROGRAMS, PAST AND PRESENT* 231 (1985); RACHEL G. BRATT, *PUBLIC HOUSING: THE CONTROVERSY AND CONTRIBUTION IN CRITICAL PERSPECTIVES ON HOUSING* 335 (Rachel Bratt, Chester Hartman, Ann Meyerson eds., 1986). For a capsule history of federal rental housing programs, including the post World War II adoption of numerical goals for housing construction, see Peter W. Salsich, Jr., *A Decent Home for Every American: Can the 1949 Goal Be Met?* 71 N.C.L. REV. 1619, 1621-1626 (1993).

3. For contemporary and subsequent accounts of the genesis of the Social Security Act of 1935, see EDITH ABBOTT, *PUBLIC ASSISTANCE* (1940); WINIFRED BELL, *AID TO DEPENDENT CHILDREN* (1965); FRANCES FOX PIVEN AND RICHARD CLOWARD, *REGULATING THE POOR* (1971); LINDA GORDON, *PITIED BUT NOT ENTITLED - SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994).

icy—the structure and administration of cash benefits and other income support systems—and housing policy for poor people.<sup>4</sup>

Income maintenance and assisted housing, as the two dominant governmental poverty programs, are on a collision course. This collision appears even more likely when the federal housing program at issue is the tenant-based subsidy,<sup>5</sup> and when the federal housing poverty goal is mobility.<sup>6</sup> This Essay discusses how, if one accepts the premises of mobility-based anti-poverty strategies,<sup>7</sup> the geographical parochialism and structural rigidity of the welfare system undermine mobility goals.

The Essay also examines the possibility that current trends in housing policy will undercut anti-poverty goals. The first federal housing program focused on subsidizing persons with limited, but earned, income.<sup>8</sup> Only relatively recently has legislation put fed-

4. See, e.g., Florence Roisman and Hilary Botein, *Housing Mobility and Life Opportunities*, 27 CLEARINGHOUSE REV. 335 (1993). See also Michael A. Stegman, *National Urban Policy Revisited*, 71 N.C.L.REV. 1737, 1766-7 (1993) (commenting on bureaucratic reasons for the lack of cooperation among federal agencies responsible for implementing poverty policies).

5. "Tenant-based" refers to the more recently created federal Section 8 Existing Housing Program, 42 U.S.C. § 1437f (1988 & Supp. V 1993), 24 C.F.R. §§ 882, 982 (1994) and the Housing Voucher Program, 42 U.S.C. § 1437f(o) (1988 & Supp. V 1993), 24 C.F.R. §§ 887, 982 (1994), which subsidize rents so that tenants pay a percentage of their income in order to rent in the private sector. "Project-based" programs include the original conventional public housing program of the United States Housing Act of 1937, 42 U.S.C. § 1437c (1988 & Supp. V 1993), 24 C.F.R. § 912 (1994). For a summary of the major federal housing programs, see Fred Fuchs, *Introduction to HUD Conventional Public Housing, Section 8 Existing Housing, Voucher, and Subsidized Housing Programs*, 25 CLEARINGHOUSE REV. 782 (1991)(Part I: Conventional Housing); 25 CLEARINGHOUSE REV. 990 (1991)(Part II: Section 8 Existing Housing, Voucher, and Subsidized Housing). For a brief history of federal project-based and tenant-based subsidies, see JOHN I. GILDERBLOOM AND RICHARD P. APPELBAUM, *RETHINKING RENTAL HOUSING* 74-80 (1988).

6. "Mobility" refers to the use of a flexible subsidy to enable a tenant to move away from areas of concentrated poverty, and, inferentially, from a dearth of employment and educational opportunity. See, e.g., GEORGE E. PETERSON AND KALE WILLIAMS, *HOUSING MOBILITY: WHAT HAS IT ACCOMPLISHED AND WHAT IS ITS PROMISE?* (Pre-Conference Paper for First National Conference on Housing Mobility as an Anti-Poverty Strategy, Oct. 1994).

7. 8. For a leading challenge to the exclusively integrationist premises underlying mobility strategies, see John Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C.L.REV. 1486, 1494-5 (1993).

8. See ROBERT FISHER, *Origins of Federally Aided Public Housing, in FEDERAL HOUSING POLICY & PROGRAMS, PAST AND PRESENT* 231, 232-6 (J. Paul Mitchell ed., 1985)(describing the antecedents of federal housing programs as being the federally financed construction of housing for employees of the defense industry during World War I, as well as the creation in 1932 of the Reconstruction Finance Corporation, the first federal agency to finance private sector housing for any tenant regardless of the tenant's source of income).

eral housing dollars into service for the benefit of the very poor.<sup>9</sup> Yet, even as the gap grows between rising private market rents and eroding public welfare benefits, federal housing policy is reverting, once again, to favor tenants who are employed and who are local. This movement away from housing those with the greatest need resonates with proposals to eliminate income supports for those least able to support themselves in the private economy.

## II. Mobilization Strategies in the Face of Parochialism in Public Assistance Policies

### A. The "Spatialization"<sup>10</sup> of Visible Poverty—Past and Present

Americans show extraordinary ambivalence about mobility. It is at once treasured and feared: treasured as an attribute and enabler of personal autonomy, feared as a characteristic of the unpredictable and uncontrollable stranger.<sup>11</sup> Fear of the transient has motivated key elements of our social policy, from the awarding of public assistance to the physical and intellectual containment of the visible, begging poor.<sup>12</sup>

Social policy excludes the wandering visible poor in at least three ways: through the denial of assistance, through physical segregation, and through the criminalization of transience. Eighteenth century communities in colonial North America controlled expenditures for poor relief by screening for residency, not for eligibility; assistance was given casually as an incident of membership in the

9. See RACHEL G. BRATT, *Public Housing: The Controversy and Contribution*, in CRITICAL PERSPECTIVES ON HOUSING 335, 339 (Rachel Bratt, Chester Hartman, Ann Meyerson eds., 1986) (explaining how public housing rent limits were imposed by the 1949 National Housing Act to remove public housing from competition with the private housing industry).

10. Austin Sarat used the term "spatialized" to describe poor people whose insecurity is both symbolized and concretely reinforced by their confinement in the waiting room of the offices where they seek benefits. Austin Sarat, "... *The Law is All Over*": Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 YALE JOURNAL OF LAW AND THE HUMANITIES 343, 360 (1990). I use the term "spatialization" first, to capture the preoccupation in American poverty policy with controlling the geographical location of poor people and, second, to evoke the related process of "spatial isolation." Spatial isolation is the term used by Douglas Massey and Nancy Denton to describe how private and public attitudes and policies combine to sequester African-Americans physically. See DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 83 (1993).

11. Lawrence M. Friedman, *Crimes of Mobility*, 43 STAN. L. REV. 637, 638 (1991).

12. See Helen Hershkoff & Adam Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 910-911 (1991) (on the spatialization by the non-poor of the visible poor).

community. To be "deserving" meant to be local; ties to the neighborhood sufficed as a voucher for credibility. Strangers without local ties were simply "warned out,"<sup>13</sup> a practice that continued into the twentieth century.<sup>14</sup> In addition to, or in place of, warning out statutes, states throughout the nineteenth and early twentieth centuries constructed elaborate schemes for the enforcement of obligations among counties that provided reciprocal reimbursement for the public care of non-resident indigents, including the costs of medical care, lodging and burial.<sup>15</sup>

The second expedient, the use of "indoor relief," the practice of confining the able-bodied indigent in poorhouses or workhouses, proved to be expensive and administratively chaotic. Poorhouses suffered from managerial difficulties in staffing and budgeting. In addition, theoretical conflicts over whether rehabilitation or punishment was the proper mission of the poorhouse translated into additional problems in programmatic implementation. As a result, the practice of institutionalizing poor people did not expand significantly past its implementation earlier in the century in the northeastern cities and areas of the South.<sup>16</sup>

The last, perhaps most common, means of isolating nonindigenous poverty was to criminalize it. Nineteenth century Americans were obsessed with "tramps" and attributed to them all manner of property despoliation, violent crime and moral degeneration.<sup>17</sup> Particularly during the labor unrest of the 1870s, fear of tramps

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13. "Warning out" is the practice of disclaiming financial responsibility for undesired newcomers by giving them a pro forma "warning" not to remain. See JOSIAH H. BENTON, *WARNING OUT IN NEW ENGLAND* (1911). See also DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 22-29 (1971); Douglas L. Jones, *The Strolling Poor: Transience in Eighteenth Century Massachusetts*, 8 J. SOC. HIST. 28 (1974-5); Gary B. Nash, *Urban Wealth and Poverty in Pre-Revolutionary America*, 6 J. INTERDISCIPLINARY HIST. 545, 562 (1976).

14. See, e.g., *Lucht v. Bell*, 8 N.W.2d 26, 27-28 (Minn. 1943) (finding that plaintiffs are not "poor persons" subject to removal under state's warning-out statute).

15. See MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE* 21 (1986) (noting that "Towns often spent more money ridding themselves of paupers than they would have spent supporting them"); see, e.g., *The Inhabitants of Bridgewater v. The Inhabitants of Dartmouth*, 4 Mass. Reports 273 (1808) (adjudicating whether the town of Bridgewater was estopped from claiming reimbursement for the maintenance of a mother and her three children, and for funeral expenses for one child, and for maintenance and funeral expenses of another "pauper," as a result of Bridgewater's imperfect notice to Dartmouth of the presence of these alleged residents of Dartmouth in Bridgewater).

16. For descriptions of the administration of poorhouses and of the contemporaneous debates over their efficacy in controlling poverty, see ROTHMAN, *supra* note 14, at 180-205 (1971); KATZ, *supra* note 16 at 3-35, 85-109 (1986).

17. Friedman, *supra* note 12 at 657.

served as code for fear of the unemployed and promoted two developments: the widespread enactment of particularly vicious anti-vagrancy legislation and the retraction of public cash relief.<sup>18</sup> In addition to criminalizing the poor directly, states imposed penalties upon anyone transporting persons likely to become public charges.<sup>19</sup> Our modern "right to travel" jurisprudence, as it has affected the ease with which poor people may change residency and apply for public assistance, began with the voiding of California's "Okie" statute, which criminalized the in-state importation of any indigent persons who subsequently applied for relief.<sup>20</sup> In the course of ruling that such statutes impermissibly burdened interstate commerce,<sup>21</sup> the Supreme Court noted the influence on legislation of the perception of "the spectacle of large segments of our population constantly on the move . . . ."<sup>22</sup>

Modern containment strategies for visible poverty echo these historical precedents. The actual or constructive denial of relief to new residents, a feature exacerbated by regional variations in payment amounts and services, re-emerges as such a significant factor in current reformulations of welfare programs that this Essay addresses it in a separate section.<sup>23</sup> States and municipalities have re-invented policies that exclude poor people from the polity, either through actual physical containment or through banishment. Despite the history of fiscal and administrative problems of indoor relief, the ideological appeal of controlling the movement of the poor was powerful enough for the program to re-emerge in the 1980s in the form of compelled institutional placements for general relief recipients.<sup>24</sup> Commentators describe such "shelterization" of

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18. See MICHAEL DAVIS, *Forced to Tramp: The Perspective of the Labor Press, 1870-1900*, in WALKING TO WORK: TRAMPS IN AMERICA, 1790-1935 at 141, 161-2 (Eric H. Monkkenen, ed., 1984) (noting resemblance of anti-tramp laws to southern "black codes," and giving as examples Connecticut's offering of bounties for turning in tramps, and Ohio's enactment of mandatory three year jail terms for lighting fires or entering yards).

19. See 41 AM. JUR., "Poor and Poor Laws," Section 28, "Transient and Unsettled Paupers;" see, e.g., *Risner v. State ex rel. Martin*, 9 N.E.2d 151 (1936) (imposition of fine as civil penalty for the transport of indigent person into county or township).

20. See generally Stephen Loffredo, "If You Ain't Got the Do, Re, Mi": *The Commerce Clause and State Residence Restrictions on Welfare*, 11 YALE L. & POL'Y REV. 147 (1993) (describing the history of the construction of the Commerce Clause which invalidates durational residency requirements for the receipt of benefits).

21. *Edwards v. California*, 314 U.S. 160, 177 (1941).

22. *Id.* at 173.

23. See *infra* part II.B.2.

24. General relief, general assistance, and home relief programs descend directly from the scattered municipal outdoor relief programs of the nineteenth century. As a

homeless persons as both a process and a consequence of putting homeless people out of sight.<sup>25</sup> A recent survey noted thirteen instances of municipal restrictions on the public presence of homeless people.<sup>26</sup> These restrictions are manifest in (i) the enactment of new ordinances prohibiting activities that homeless people must perform in public, such as sleeping<sup>27</sup> and, (ii) the intensified, targeted enforcement of existing trespassing and traffic ordinances against street people.<sup>28</sup> For example, the U.S. district court in *Pot-*

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category, general assistance refers to state or locally operated programs of cash assistance to individuals who are unable to qualify for any other benefit. For descriptions of the history of general assistance in two individual states, see Louis Rosenberg, *Overseeing the Poor: A Legal-Administrative Analysis of the Indiana Township Assistance System*, 6 IND. L. REV. 336 (1973); Kerry R. Bensinger, *From Public Charity to Social Justice: The Role of the Courts in California's General Relief Program*, 21 LOY. L.A.L. REV. 497 (1988). For programs that required institutionalization as a condition of receiving cash benefits, see *Robbins v. Superior Court*, 695 P.2d 695 (Cal. 1985)(finding invalid under state statutory welfare law, and state constitutional privacy law, Sacramento County's replacement of its cash program with monitored dormitory living, with curfews and restrictions on visitors); *Bedford v. Sugarman*, 772 P.2d 486 (Wash. 1989)(upholding Washington state's program to require General Assistance recipients with drug and alcohol dependencies to live in controlled shelters).

25. See Louisa R. Stark, *The Shelter as "Total Institution,"* 37 AM. BEHAVIORAL SCIENTIST 553, 560 (1994)(identifying shelters for homeless people with "total institutions," which exist in part to segregate persons perceived to pose a threat to the existing social order); Jeffrey Grunberg and Paula F. Eagle, *Shelterization: How the Homeless Adapt to Shelter Living*, 41 HOSP. & COMM. PSYCHIATRY 521 (1990)(describing residents' self-destructive adaptations to physically dangerous and psychologically destabilizing conditions in a large New York City shelter).

26. NAT'L L. CENT. ON HOMELESSNESS & POVERTY, *No Homeless People Allowed: A Report on Anti-Homeless Laws, Litigation and Alternatives in 49 United States Cities*, Table I - Enactment or Enforcement of Anti-Homeless Policies or Laws in 1994 (Dec. 1994).

27. See *Roulette v. City of Seattle*, 850 F. Supp. 1441, 1447 (W.D. Wash. 1994)(upholding enactment of city ordinance prohibiting sitting or lying on public sidewalks in business districts during certain hours); *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 395 (Cal. App. 1994)(invalidating recent enactment of "camping ordinance," and also finding a pattern in previous municipal actions of a concerted campaign of harassment against homeless people, *id.* at 387-390), *rev'd* 40 Cal. Rptr. 2d. 402 (1995); *Johnson v. Dallas*, 860 F. Supp. 344, 350 (N.D. Texas 1994)(striking city ordinance which prohibited public sleeping, as a violation of the Eighth Amendment).

28. See, e.g., *Joyce v. City of San Francisco*, 846 F. Supp. 843, 846 (N.D. Cal. 1994)(describing San Francisco's "matrix program," of concerted enforcement against public drinking, obstruction, littering, public sleeping, and public defecation/urination, instituted after a report by the mayor's office attributing to the public presence of homeless people an estimated loss to the city of \$173 million in sales). See ROB ROSENTHAL, *HOMELESS IN PARADISE: A MAP OF THE TERRAIN* 1-17 (1994)(describing history of Santa Barbara's "anti-sleeping" ordinance); see generally Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631 (1992); Paul Ades, *The Unconstitutionality of "Antihomless" Laws: Ordinances Prohibiting Sleep-*



*tinger v. City of Miami*<sup>29</sup> ordered the creation of two "safe zones" within which homeless persons could sleep or eat without fear of arrest.<sup>30</sup> Although the ruling intended to protect homeless persons from official harassment, it may prove to be just as isolating as the practices it condemned.

The most powerful rhetoric of spatialization of visibly poor people emerges from two major "begging" cases. The U.S. Court of Appeals for the Second Circuit, in *Young v. New York City Transit Authority*,<sup>31</sup> upheld prohibitions on begging within the Port Authority building, and the New York City subway and commuter rail systems. The court portrayed a scenario of captive commuters defenseless against predatory panhandlers. The opinion presents a Piranesian underground world in which commuters must navigate "steep and long staircases and mechanical escalators to wait on narrow and crowded platforms bounded by dark tunnels and high power electrical rails."<sup>32</sup> According to the Court, the presence of panhandlers, in this already menacing setting, creates personal and more far-reaching anxiety. An expert for the City described the commuters' experience with panhandlers in this context as "inherently aggressive."<sup>33</sup> In the second case, *Loper v. New York City Police Department*,<sup>34</sup> the Second Circuit held that begging in an unconfined area, such as a sidewalk, is a mode of protected speech. *Loper*, therefore, limits the state's prerogative in protecting public safety to confined spaces.<sup>35</sup> Not surprisingly, the same expert who testified in *Young* suggested in *Loper* that begging, even in unconfined public spaces, contributes to the "Broken Windows" effect,<sup>36</sup>

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*ing in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595 (1989).

29. 810 F. Supp. 1551 (S.D. Fla. 1992), *remanded*, 88-2406-CIV-CCA (11th Cir. Dec. 7, 1994).

30. *Id.* at 1584.

31. 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990).

32. *Young*, 903 F.2d at 149.

33. *Id.* at 150 (quoting Professor George Kelling, consultant to the Transit Authority).

34. *See Loper v. New York City Police Dep't*, 999 F.2d 699, (2d Cir. 1993) (finding that city sidewalks, unlike subway terminals, are public fora, and that begging on city sidewalks is expressive speech which the state cannot show any sufficiently compelling interest to regulate), *aff'g* *Loper v. New York City Transit Authority*, 802 F. Supp. 1029 (S.D.N.Y. 1992).

35. *Id.*

36. *See*, George L. Kelling and James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY, at 29 (Mar. 1982) (arguing that signs of disorder and decay, such as broken windows in neighborhoods, directly lead to a loss of social order and decay, including serious crime).

in which city residents experience begging as one of several threatening indicia of urban decay.<sup>37</sup>

The personal insecurity of the city-dweller that so readily associates the transient stranger with disorder often does not stop at fear of the panhandler or homeless person.<sup>38</sup> Unfortunately, poor families seeking housing subsidies with the hope of making new lives in new places, must contend with this fear and other stereotypes. For example, poor women of color who wish to relocate encounter the stereotype and public distaste for the "welfare mother"<sup>39</sup> and unverified assumptions that poor women moving into a neighborhood do, in fact, receive public assistance.<sup>40</sup> These negative images about the poor are often powerful enough to contribute to the disruption of entire programs.<sup>41</sup>

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37. *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1034, 1046 (S.D.N.Y. 1992)(paraphrasing Professor Kelling's testimony that the presence of beggars, along with "broken windows, drug dealers, and youth gangs" signals the onset of urban disorder), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

38. See SALLY ENGLE MERRY, *URBAN DANGER: LIFE IN A NEIGHBORHOOD OF STRANGERS* 201 (1981)(chronicling historical European as well as American perceptions of urban threat, in the person of the criminal and the "socially marginal"); *id.* at 237-8 (noting that perception of individuals as rootless or "detached" persons induces fear of crime).

39. See WAHNEEMA LUBIANO, *BLACK LADIES, WELFARE QUEENS, AND STATE MINSTRELS: IDEOLOGICAL WAR BY NARRATIVE MEANS*, in *RACE-ING JUSTICE, ENGENDERING POWER* 323, 338-9 (Toni Morrison ed., 1992)(noting popular culture as holding "welfare queens" responsible for personal and societal degeneration); Michael Morris & John B. Williamson, *Stereotypes and Social Class: A Focus on Poverty*, in *IN THE EYE OF THE BEHOLDER: CONTEMPORARY ISSUES IN STEREOTYPING* 411, 424-5 (Miller ed., 1982)(finding that imagery of "deficient character and motivation" predominates when non-poor people think about poor people, especially people receiving welfare benefits).

40. For example, of the first twenty-eight participants to attend orientation sessions for Baltimore's "Moving to Opportunity" program, twenty-one were receiving benefits from the Aid to Families with Dependent Children (AFDC) program and six were working and receiving no income benefits. Interview with Ruth Crystal, Director, Moving to Opportunity Program, Baltimore, Maryland (Dec. 1, 1994)(notes on file with author).

41. The very recent and explosive community reaction to Moving to Opportunity in Baltimore, which led to the national curtailment of the Moving to Opportunity Program (hereafter, MTO), is a complicated story of electoral politics and historic patterns that exceeds the scope of this essay. Many expressed opposition to, and support for, the program. A leading opponent, at the time a delegate to the state assembly, made the most publicized, though not necessarily the most representative, pronouncement against the program: "I'm not discussing race or poverty, but I'm concerned that they might send out people who have to be taught how to bathe, how not to steal, and how not to smoke pot." Ed Brandt, *Scare Tactics Bring Down Federal Housing Program*, THE SUN (Baltimore), Oct. 30, 1994, at 1B (quoting Louis L. DePazzo, former Delegate, 7th District, Maryland House of Delegates). See also H.R. REP. 715, 103d Cong., 2d Sess. at 43-44 (1994)(deferring the entirety of the 1995 budget request for Moving to Opportunity Counseling, citing doubt about the "field

Fear of the mobile poor only synergizes these already potent prejudices.<sup>42</sup>

## **B. The Modern Welfare Benefits System: Reinforcement of Localism in a Nationalized System**

### **1. The Persistence of Geographical Boundaries Under the Current Federal System**

In his opinion for the majority in *Edwards v. California*,<sup>43</sup> Justice Byrne acknowledged the new demographic and political realities of providing for people in need in a highly mobile nation:

Indeed, the record in this very case illustrates the inadequate basis in fact for the theory that relief is presently a local matter. . . . [I]n not inconsiderable measure the relief of the needy has become the common responsibility and concern of the whole nation.<sup>44</sup>

Relying twenty-seven years later on Justice Douglas's concurrence in *Edwards*, the Supreme Court upheld in *Shapiro v. Thompson* not merely a negative right to travel free from state-imposed impediments, but an affirmative right for welfare recipients to consider mobility in making the same assessments about the quality of life that other Americans do.<sup>45</sup> The Court's invalidation of one-year residency requirements for welfare recipients confirmed the idea of national responsibility, and national access, for welfare.

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staff capacity to properly handle the program"). For a general description of goals and design of the five-city MTO demonstration project, see *infra* part III.

42. See, e.g., Madeline Morris, *Stereotypic Alchemy: Transformative Stereotypes and Antidiscrimination Law*, 7 YALE L. & POL'Y REV. 251, 251-2 (1989) (hypothesizing that imposition of non-suspect characteristics upon members of suspect class will result in new vehicles for discrimination against members of the suspect class). In this instance, neither "welfare" nor "mother" individually is traditionally "suspect;" yet, powerful stereotypes associated with each prove extremely stigmatizing when both are joined. See Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 284 (1991) (noting the labeling of single mothers as degenerate and "implicated by their asserted role in the intergenerational transmission of poverty").

43. *Edwards v. California*, 314 U.S. 160 (1941).

44. *Id.* at 175.

45. *Shapiro v. Thompson*, 394 U.S. 618, 632 (1968): "But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities." But see Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1611-1612 (1987) (noting that arguments before the Court in *Shapiro* did indeed emphasize the hardships posed by the challenged durational residency requirements, even if the opinion emphasized the commonality between the welfare applicant's and the middle class person's goals).

Despite this recognition that an easily accessible national welfare program is needed, the current structure of welfare preserves the ancient state-to-state prerogatives, jealousies and inequities.

One such inequity, the most serious and obvious one, is the mobility barrier created by the state-to-state disparity in payment amounts. State-run and financed general assistance programs—where they still exist<sup>46</sup>—differ from state to state, and sometimes even from county to county.<sup>47</sup> Food stamps<sup>48</sup> and Supplemental Security Income<sup>49</sup> are the only major welfare programs with national standards of payment.<sup>50</sup> The federal-state structure of the Aid to Families with Dependent Children (AFDC) program, however, affords states latitude in the area of setting payment levels.<sup>51</sup> As a result, there are presently huge variations from state to state in monthly payment levels.<sup>52</sup>

While payment differentials conserve state prerogatives, they also resurrect the same “welfare magnet”<sup>53</sup> fears that precipitated the criminalization of the traveling poor during the pre-*Edwards* era. Thus, although researchers have discredited the theory that people cross state lines solely to take advantage of more lucrative

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46. See CENTER ON SOCIAL WELFARE POLICY AND LAW, *Jobless, Penniless, Often Homeless: State General Assistance Cuts Leave “Employables” Struggling for Survival* 1 (1994)(stating that in 1991-2, four states eliminated their general assistance programs completely, and ten others curtailed eligibility); Sarah Mulkern, *The New Law Governing Public Assistance*, 1 D.C.L. REV. 171 (1993)(describing due process violations in the replacement of the District of Columbia’s general public assistance program for incapacitated individuals with a more limited program for persons with longer-term disabilities).

47. Bensinger, *supra* note 25 at 500-01 (describing the county-based structure of California’s general relief program); MARION NICHOLS, JON DUNLAP, AND SCOTT BARKAN, NATIONAL GENERAL ASSISTANCE SURVEY, 1992 at 2-3 (Dec. 1992).

48. See 7 U.S.C. § 2011-32 (1988 & Supp. V 1993); 7 C.F.R. Part 271 (1994).

49. 42 U.S.C. § 1381-85 (1988 & Supp. V 1993); 20 C.F.R. Part 416 (1994).

50. See STAFF OF HOUSE COMM. ON WAYS AND MEANS, 103d Cong., 2d Sess., OVERVIEW OF ENTITLEMENT PROGRAMS: 1994 GREEN BOOK 768-9 (1994)[hereinafter 1994 GREEN BOOK](listing standardized national maximum monthly food stamp allotments); *id.* at 217 (noting that the 1994 federal SSI benefit is \$446 per month for an individual, but that some states do supplement the benefit for selected categories of recipients).

51. See *Rosado v. Wyman*, 397 U.S. 397 (1970)(holding that a state may pare down payments to accommodate budgetary realities by reducing percent of benefits paid or by switching to a percent reduction system, but it may not obscure actual standards of need).

52. See, e.g., 1994 GREEN BOOK, *supra* note 51 at 375-6 (listing monthly payment levels for each state for a household of three).

53. The “welfare magnet” theory posits that poor people are willing to move interstate to obtain higher welfare benefits.

welfare packages,<sup>54</sup> these fears motivate states to impose differential benefits by state of last residency and durational residency requirements in their state-run general relief programs.<sup>55</sup> During the Bush Administration, states received permission from the federal government to extend such restrictions to their AFDC programs as well.<sup>56</sup>

The Department of Health and Human Services has foresworn the practice of allowing states to erect such barriers against in-state migration.<sup>57</sup> Nonetheless, the increased rate at which the federal government seems willing to cede discretion to the states under current welfare law, using the mechanism of the "welfare waiver," causes other concerns for mobility over and above the impact of any proposed substantive changes.<sup>58</sup> Arguably any major state-to-state differences in the eligibility criteria for benefits, or the time

54. See, e.g., RUSSELL L. HANSON AND JOHN T. HARTMAN, DO WELFARE MAGNETS ATTRACT? 14-15 (Inst. for Research on Poverty Discussion Paper no. 1028-94, Feb. 1994)(finding from analysis of sample from Current Population Surveys that poor women of child-bearing age are as likely to move to states with low wages and benefits as to states with high wages and benefits); PAUL E. PETERSON AND MARK C. ROM, WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD 82-3 (1990)(concluding that poor people evaluate welfare benefit levels as they do wage rates, as one of many factors that may influence migration).

55. See *Mitchell v. Steffen*, 504 N.W.2d 198 (Minn. 1993) (invalidating statute that reduced general assistance benefits for persons who had lived in Minnesota for fewer than six months), *cert. denied*, 114 S. Ct. 902, (1994); *Aumick v. Bane*, 612 N.Y.S.2d 766 (Sup. Ct. 1994)(invalidating decrease of 20% in home relief benefit for residents living in the state for fewer than six months). But see *Jones vs. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992) (upholding 60 day residency requirement for general relief benefits), *reh'g denied*, 491 N.W.2d 77 (Wis. 1992).

56. California and Wisconsin received permission through the waiver process to impose residency restrictions on new applicants for AFDC benefits. Challenges to these states' plans were upheld or are pending. See *Green v. Anderson*, 811 F. Supp. 516, 521 (E.D. Cal.1993)(holding California's 12 month residency requirement for full AFDC benefits unconstitutional), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *cert. granted* No. 94-197 (Oct. 7, 1994); *cert. dismissed*, — U.S. —, 115 S. Ct. 1059 (1995); *V.C. v. Whitburn*, Civil Action No. 94-C-1028, Complaint at 9-10 (E.D. Wisc. filed Sept. 12, 1994)(describing § 49.19 (11m), Wis. Stats. (1992-92), which limited payment of AFDC benefits to new residents of Wisconsin, for their first six months of residence, to levels received in their previous state of residence).

57. *Before the Subcomm. on Human Resources and Intergovernmental Relations of the House Comm. on Government Operations*, 103d Cong., 2d Sess. 4 (1994)(statement of Mary Jo Bane, Assistant Secretary for Children and Families, U.S. Department of Health and Human Services).

58. For articles critical of the speed and superficiality of review of states' requests under 42 U.S.C. § 1315 (1988 & Supp. V 1993) to alter key elements of the AFDC program, see Lucy Williams, *The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard*, 12 YALE L. & POL'Y REV. 8 (1994); Susan Bennett and Kathleen Sullivan, *Disentitling the Poor: Waivers and Welfare "Reform,"* 26 U. MICH. J.L. REF. 741 (1993).

limits within which recipients can continue to receive them,<sup>59</sup> may make it more difficult for potential recipients to move.

## 2. *Current Proposals Renew Geographic Boundaries*

After sixty years of struggling to impose national norms on state-federal programs of welfare assistance, the trend in today's "welfare reform" is to cede even greater autonomy to the states, even to the point of allowing them to re-introduce mobility barriers that it took almost as long to tear down.

Proposed national changes would eliminate the AFDC program, thereby increasing state-to-state fluctuation.<sup>60</sup> Specifically, the Personal Responsibility Act of 1995, H.R. 4, gives states, the primary gatekeepers of federal housing assistance, several substantive options with direct and indirect impacts on mobility. For example, the bill re-introduces the option of awarding differential welfare benefits based on the payment level in the state of the applicant's previous residence.<sup>61</sup> One option, that of denying federal subsidies to families that contain children born out of wedlock to a head of household under the age of 18,<sup>62</sup> clearly impedes mobility and tramples existing federal housing policy.<sup>63</sup>

Plans to devolve the funding and administration of AFDC to the states pose the greatest disruption to the framework of the federal public assistance system.<sup>64</sup> One advantage of the nationalized AFDC system is that it imposes procedural uniformity, state to state and county to county.<sup>65</sup> Until recently, the federal govern-

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59. CENTER ON SOCIAL WELFARE POLICY AND LAW, SUMMARY OF AFDC WAIVER ACTIVITY SINCE FEBRUARY 1993 9 (1994) (listing states that have received or are waiting for approval of proposals to limit duration of AFDC benefits. The proposals vary from conditioning full payment at the end of the term upon recipient's participation in a work program, to reduction of payment level at the end of the term, to total termination of payments.)

60. It should be noted that, as of this writing, proposals to change the national welfare entitlements system are in an extreme state of flux. The author has chosen H.R. 4, 104th Cong., 1st Sess. (1995), as the predominant proposal.

61. H.R. 4, Sec. 101, § 403(c)(2) (1995) ("Authority to treat interstate immigrants under rules of former State").

62. H.R. 4, Sec. 101, § 405(a)(4)(A) (1995).

63. See 24 C.F.R. § 982.202(b)(4)(i)(A) (1994) [59 Fed. Reg. 36685, July 18, 1994] (prohibiting the denial of admission to the Section 8 certificate or voucher program because members of the family include unwed parents or children born out of wedlock).

64. H.R. 4 replaces the current funding scheme with block grants.

65. See 42 U.S.C. § 602(a)(1) (1988) (noting that a state plan under AFDC must be in effect in every political subdivision of the state); 42 U.S.C. § 602(a)(2)(1988) (requiring the state to create or designate a single state agency to administer the state

ment required states to adhere to this over-arching framework,<sup>66</sup> which included guarantees to uniform application procedures<sup>67</sup> and to due process.<sup>68</sup> It is unclear that any plan to return authority for administration of public assistance to the states would retain any such uniform protections. At the least, under a patchwork, state-to-state regime, poor persons seeking to transfer their benefits cases across state (or even county) lines could encounter delays; at worst, they would lose their benefits and be forced to re-apply.

### 3. *Other Welfare Barriers to Mobility*

Several other elements of the current federal system hinder families' mobility, either by failing to equip them to move to more desirable jurisdictions or by failing to assist them in implementing their goals should they succeed in moving. In the present system, for example, benefits decrease with increases in income.<sup>69</sup> Even with these reductions, should wage-earners manage to put money away, ceilings on the accumulation of resources limit families' ability to conserve funds for moving and security deposit expenses.<sup>70</sup> States have requested and received waivers of these limits in order to allow recipients to retain more income from employment and to

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AFDC plan); 45 C.F.R. § 205.100 (1994) (on administration of the single state agency).

66. See *King v. Smith*, 392 U.S. 309 (1968) (finding that states must conform their practices in distributing federal AFDC benefits to the requirements set forth in the Social Security Act); see also the Improving America's Schools Act of 1994, Pub. L. 103, CONG. REC. H10151 (daily ed. Sept. 28, 1994) (to be codified at 42 U.S.C. § 1301-1320b-13)(preserving the enforceability of the Social Security Act against non-conforming provisions of state plans).

67. See 42 U.S.C. § 602(a)(10)(A)(1988) (requiring states to allow all individuals who wish to apply for AFDC to do so).

68. 42 U.S.C. § 602(a)(4) (1988).

69. See 42 U.S.C. § 602(a)(8)(B)(ii)(II)(1988) (limiting the "disregards," or deductions, from earned income of AFDC recipients to \$30 plus one-third of the remaining income for the first four consecutive months of employment during the period of AFDC receipt; eliminating the one-third disregard after the fourth month; and eliminating the \$30 after the eighth month). See also 1994 GREEN BOOK, *supra* note 51, at 330 (calculating monthly benefits after computing disregards from earned income under the 1981, 1984 and 1988 revisions to the AFDC income disregards formulae).

70. 73. 42 U.S.C. 602(a)(7)(B)(1990) (setting ceiling of \$1000 for accruable resources); 45 C.F.R. § 233.20(a)(3)(i)(B) (1994) (setting a thousand dollar resource limit for each recipient household, and a fifteen hundred dollar limit on equity value of any automobile); *Mercado v. Commissioner of Income Maintenance*, 607 A.2d 1142, 1146 (Conn. 1992) (interpreting the Social Security Act and regulations to classify accumulated students' earnings as "resources" and included in earned income); *Hazard v. Shalala*, 44 F.3d 399 (6th Cir. 1995) (upholding \$1500 vehicle exclusion); *Champion v. Shalala*, 33 F.3d 963 (8th Cir. 1994) (upholding the \$1500 vehicle exclusion).

keep more savings.<sup>71</sup> Nonetheless, no state system of "income disregards" currently in place totally eliminates impediments to saving.

Moreover, structures theoretically in place to increase welfare recipients' marketability and, as a corollary, increase their ease of mobility, do not serve most of their eligible populations. The "Jobs Opportunities and Basic Skills" program (JOBS), the linchpin of the present federal work requirement for welfare recipients, mandates that states (i) enter into individualized work plans with recipients,<sup>72</sup> (ii) operate at least four work or work readiness programs,<sup>73</sup> and (iii) guarantee child care to program participants.<sup>74</sup> Few welfare recipients are exempted from the program,<sup>75</sup> making it an expensive program for states to run. Furthermore, the goals of the program seem modest to the point of undercutting true training for economic mobility. For instance, the states are only required as a part of obligatory educational services to provide GED equivalents, or remedial reading to a literacy level of grade 8.9;<sup>76</sup> states may in fact restrict post-secondary education or training,<sup>77</sup> an option that the absence of federal reimbursement for self-initiated education encourages.<sup>78</sup> In practice, states are unable to pay for supportive services, such as daycare, and as a result the

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71. See CENTER ON SOCIAL WELFARE POLICY AND LAW, SUMMARY OF AFDC WAIVER ACTIVITY SINCE FEBRUARY 1993 7-8 (1994) (listing states with approved or pending requests for waiver of present regulatory requirements, to allow more generous treatment of earnings and resources).

72. See The Family Support Act of 1988, Part F - Job Opportunities and Basic Skills Training Program, 102 Stat. 2343, 2360 (1988), 42 U.S.C. § 681 (1988); 42 U.S.C. § 682(b)(1)(A-B) (1988) (requiring the state plan to provide for an assessment of the participant's employability, training needs, and needs for supportive services, and to work with the participant to develop an "employability plan" based on that assessment).

73. 42 U.S.C. § 682 (d)(1)(A)(i) (1988), 45 C.F.R. § 250.44 (1994) (requiring states to offer at least remedial education, job skills training, job readiness training, and job development and job placement). States must also offer two of four additional services, consisting of group and individual job search, on the job training, work supplementation [reservation of AFDC payments for subsidized jobs, see 42 U.S.C. § 682(e) (1988)], and community work experience programs [unpaid placement in public service projects, see 42 U.S.C. § 682(f) (1988)], 42 U.S.C. § 682(d)(1)(A)(ii) (1988), 45 C.F.R. § 250.45 (1994).

74. 42 U.S.C. § 602(g) (1988 & Supp. V 1993).

75. See 42 U.S.C. § 602(a)(19)(C) (1988 & Supp. V 1993), 45 C.F.R. § 250.30(b)(1994) (listing exemptions from JOBS participation).

76. 45 C.F.R. § 250.44 (a)(1,2) (1994).

77. 45 C.F.R. § 250.48(a)(4) (1994).

78. 45 C.F.R. § 250.48(a)(3) (1994).



program serves few who need it. In fact, as of 1992, JOBS had an average monthly rate of only 12% participation.<sup>79</sup>

The effects of the underfunding of the JOBS program percolate through the housing component of the anti-poverty system. Housing programs, such as those operating under the Family Self Sufficiency Act, obligate housing authorities to link residents of public housing or holders of tenant-based subsidies with existing job training and education programs.<sup>80</sup> These programs depend heavily on the JOBS program. One study of a pre-cursor to the Family Self Sufficiency program found that underfunding of JOBS seriously compromised the program's ability to find support services for their participants.<sup>81</sup> Housing authorities may even receive exemptions from operating Family Self Sufficiency programs if they can certify unavailability of local supportive services, such as JOBS.<sup>82</sup>

If welfare programs aim to prepare participants for gainful employment, workfare and phased-in welfare deductions appear to be enticing solutions. Unfortunately, experience shows that workfare programs are costly, require long periods of time before achieving results, and are effective only for certain recipients.<sup>83</sup> Equally disappointing is the present system of phased-in welfare deductions.

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79. GOVERNMENT ACCOUNTING OFFICE, JOBS AND JTPA: TRACKING SPENDING, OUTCOMES, AND PROGRAM PERFORMANCE 5 (July 1994). See e.g., *Dubose v. Bradley*, No. 93-C-496, (N.D. Ill. Mar. 19, 1993) (Final Judgment Order 1-2) (describing Illinois' practice of guaranteeing child care only to participants in its JOBS program, and then its closure of intake into its JOBS program); *id.* at 4-5 (permanently enjoining the state from providing child care support only to those JOBS participants enrolled in the program prior to its shutdown).

80. The Family Self Sufficiency program is voluntary for tenants, but obligatory for housing authorities receiving funding for additional public housing units, Section 8 certificates or vouchers during fiscal year 1993. See 42 U.S.C. § 1437u (Supp. V 1993), 24 C.F.R. § 962 (1994) (Public Housing Family Self-Sufficiency Program); 24 C.F.R. § 984 (1994) (Section 8 Family Self-Sufficiency Program).

81. See, e.g., J.W. FREES, INGRID GOULD-ELLEN, GRETCHEN LOCKE, DEP'T OF HOUS. & DEV., OPERATION BOOTSTRAP 60-61 (1994) (study of programs in "Operation Bootstrap," a demonstration project designed by the Department of Housing and Urban Development (hereafter, HUD) to connect subsidized tenants with services to enhance the tenants' economic independence, showed that serious underfunding of JOBS programs undercut efforts of Bootstrap personnel to place participants).

82. See, e.g., 24 C.F.R. § 984.105(c)(1)(i) (1994).

83. See FRIEDLANDER AND GUERON, *Are High Cost Services More Effective than Low Cost Services?*, in EVALUATING WELFARE AND TRAINING PROGRAMS 143, 171-5 (Manski and Garfinkel eds., 1992) (finding that in some work to welfare demonstrations, though some participants showed modest gains in earnings, no clear correlation emerged between the amount spent on training and the record of recipients in leaving welfare). "Operation Bootstrap" programs which attempted to target the most desperately poor participants with the fewest job skills showed only modest success rates; the discouraging results had sobering implications for private-sector funders, and encouraged "creaming," the targeting of services to candidates already primed for the

While the program may nudge working recipients off the rolls, research indicates no resulting net gain in income or employability.<sup>84</sup>

What *has* worked, according to one study, is to steer participants toward suburban opportunity. Developed in settlement of litigation that asserted governmental complicity in the creation and maintenance of racially segregated public housing, the Gautreaux<sup>85</sup> program is the primary model for the deliberate, orchestrated use of subsidies to affect mobility throughout a metropolitan area. A study of a sample of Gautreaux populations who entered the program from 1976 to 1988 found that, between participants who used housing certificates in suburbs and those who used them in more familiar neighborhoods in the city, suburban tenants who had never worked before were far more likely than their urban counterparts to be employed.<sup>86</sup> The same study concluded, however, that the absence of transportation, child care and job skills, compounded by the presence of racial discrimination, remained as impediments.<sup>87</sup> These findings suggest that support systems for welfare recipients may be critical to enabling them to benefit from the promises of mobility.

Housing and labor market realities—high housing costs, low-paying entry-level jobs—require sustained commitment to subsidizing housing and services for low-income people.<sup>88</sup> Housing programs, which define “success” as a reduced, not eliminated,

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labor market and more likely to show success. See J.W. FREES, ET AL, *supra* note 84, at 36.

84. See REBECCA BLANK, *The Employment Strategy: Public Policies to Increase Work and Earnings*, in CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE 168, 182 (Sheldon Danziger, Gary Sandefur and Daniel Weinberg eds., 1994) (summarizing research as showing that recipients who lost AFDC as a result of earnings from work showed little or no economic gain as a result of the forced transfer to work).

85. See Leonard Rubinowitz, *Metropolitan Public Housing Desegregation Remedies: Chicago's Privatization Program*, 12 N. ILL. UNIV. L. REV. 589, 590-611 (1992) (describing the Gautreaux litigation against the Chicago Housing Authority and the Department of Housing and Urban Development (HUD); *Id.* at 611-13 (describing the informal negotiation between plaintiffs' attorneys and HUD of a metropolitan remedy based on the use of tenant-based subsidies to move public housing tenants into areas of lesser minority concentration, and the formalisation of the remedy with the consent decree (*Gautreaux v. Landrieu*, 523 F. Supp. 665 (N.D. Ill. 1981))). I refer to programs adopting this model as “Gautreaux programs” and to tenant participants in this program as “Gautreaux tenants.”

86. See Susan J. Popkin, et al., *Labor Market Experiences of Low-Income Black Women in Middle-Class Suburbs: Evidence from a Survey of Gautreaux Program Participants*, 12 J. OF POL'Y ANALYSIS AND MANAGEMENT 556, 567 (1993).

87. *Id.* at 570.

88. See *id.* at 571, n.13 (noting that Gautreaux tenants rarely “work their way” off Section 8, and require long-term housing subsidies).

reliance on federal housing subsidy,<sup>89</sup> implicitly recognize the necessity of maintaining long-term supports, with housing as a critical "stick in the bundle." If the *Gautreaux* example—one (admittedly isolated) outcome of a housing mobility strategy—is to be given any chance for replication, then someone must rethink the currently fashionable menu of welfare "reforms," disastrously bounded as they are by geography and time.

### III. Poverty Policies Within the Housing System—The Creaming of America?

#### A. Access of the Very Poor to Opportunities Through Housing: The Federal Preferences System

The welfare system's primary shortcoming is its failure to pay enough for anyone to live anywhere.<sup>90</sup> Federal housing subsidies conceal, and in some ways therefore are complicit with, the states' deliberate under-funding of their "standards of need,"<sup>91</sup> a legally required but largely fictional articulation of what families actually need to live.<sup>92</sup> Housing subsidies, however, supplement the incomes of very few welfare recipients: only 21.2% of AFDC recipi-

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89. See, e.g., 24 C.F.R. § 984.102 (1994) (stating that the objective of the Family Self Sufficiency program is "to reduce the dependency of low income families on welfare assistance and on section 8 . . ."). See also Anne Shlay, *Family Self Sufficiency and Housing*, 4 HOUSING POL'Y DEBATE 457, 488-9 (emphasizing that housing subsidy is the single biggest factor in economic self sufficiency, which should not be defined as no longer relying on housing subsidy).

90. Compare, e.g., the current maximum monthly AFDC benefit for a family of three in Maryland of \$366 with the current HUD fair market rent standard for the Section 8 Existing Housing program for even a one bedroom apartment in the Baltimore metropolitan area of \$506; see 59 Fed. Reg. 49517 (1994).

91. For an expression of this view, see Barbara Sard, Florence Roisman, and Chester Hartman, *Homeless: A Dialogue on Welfare and Housing Strategies*, 23 CLEARINGHOUSE REV. 104, 107 (1989) (noting that the Section 8 rental supplements which tenants receive are in reality income supplements, since they create no new housing). For the two examples of states court litigation to exploit legislation mandating a meaningful comparison of the shelter component of a standard of need with actual AFDC payment levels, see *Massachusetts Coalition for the Homeless v. Dukakis*, 511 N.E.2d 603 (Mass. 1987); *Jiggetts v. Grinker*, 553 N.E.2d 570 (N.Y. 1990).

92. See 42 U.S.C. § 602(h)(2)(A-B) (1988) (requiring each state to report the methodology for calculating its need standard, and to articulate the relationship between need and payment standards); see 1994 GREEN BOOK, *supra* note 51 at 366-7 (comparing for all jurisdictions, for a family of three, the 185% gross income limit for application into the AFDC program, the standard of need, maximum AFDC and Food Stamp grants, and combined benefits and AFDC alone as percentages of the federal poverty guideline. For example, Maryland's \$366 monthly grant equals 72 % of the state's standard of need (\$507), and 38% of the poverty guideline.)

ents are housed in public housing or use federal subsidies.<sup>93</sup> It is not that households using federal housing subsidies are rich: fewer than 5% of all participants in federally subsidized housing have incomes exceeding the "very low income" standard that controls admission into the voucher program.<sup>94</sup> The disparity between the population of persons receiving income supports and the population of persons receiving housing supports simply underscores the restrictiveness of eligibility for welfare.

This disparity also illustrates the scarcity of housing subsidies. Unlike AFDC, housing programs are subject to funding caps; they are not entitlements,<sup>95</sup> their supply is inelastic, and their waiting lists are either long or closed.<sup>96</sup> Since recipients have difficulty surviving unassisted in the private housing market, a position on a waiting list is critical for any welfare recipient.

Therefore, how the federal government allows housing authorities to manipulate their waiting lists is particularly important for anyone hoping to use flexible subsidies to move into whatever he or she deems to be a more desirable housing location. For the moment, mobility strategies and housing programs linked with supportive services are limited primarily to current public housing residents.<sup>97</sup> Even though housing certificates and vouchers not

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93. 1994 GREEN BOOK, *supra* note 50, at 409.

94. See 59 Fed. Reg. 36663 (1994) (fewer than 5% of all Section 8 and public housing tenants have income greater than 50% of area median, i.e., are "low income" as opposed to "very low income"; see also 59 Fed. Reg. 36662 (1994) (summarizing statutorily set income boundaries for the certificate and voucher programs—participants in the voucher program must fit below "very low income," participants in Section 8 certificate program may be "low income").

95. See, e.g., 59 Fed. Reg. 36663 (1994) (emphasizing that housing programs are not entitlement programs and cannot assist every eligible family).

96. U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES: 1994, A 30-CITY SURVEY 72 (1994) (stating that seventeen of thirty cities surveyed have closed their waiting lists for at least one assisted housing program; wait for public housing ranges from three months to sixty months; wait for vouchers ranges from 3.5 months to 96 months; for section 8 certificates, from 4.5 months to 96 months).

97. See, e.g., MARY DAVIS, *The Gautreaux Assisted Housing Program*, in HOUSING MARKETS AND RESIDENTIAL MOBILITY 245 (G. Thomas Kingsley and Margery Austin Turner eds., 1993) (hereinafter *Gautreaux Assisted Housing*) (describing eligibility for certificate under the 1981 *Gautreaux* consent decree as limited to past or present tenants of Chicago Public Housing Authority public housing, and to persons on the waiting list before June 16, 1981); 24 C.F.R. §§ 962.103, 984.103 (1994) (defining "eligible families" for participation in the Family Self Sufficiency Program as current residents of public housing or holders of certificates/vouchers). Participation in the MTO demonstration also was limited to residents in public housing or in project-based Section 8 housing. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, NOTICE OF FUNDING AVAILABILITY AND THE PROGRAM GUIDELINES FOR THE MOV-

connected to any special mobility program are "portable" within a limited geographical area,<sup>98</sup> obviously an applicant must qualify from the waiting list with the home-base housing authority.

Housing authorities must devote 50% of their public housing vacancies,<sup>99</sup> and 90% of their tenant-based subsidies,<sup>100</sup> to applicants on the waiting list who fall into any of the three major categories of "federal preference:" persons in sub-standard housing (into which category homelessness and living in a shelter are statutorily defined), involuntarily displaced persons, and persons paying more than half of their income for rent.<sup>101</sup> Regulations amplify "involuntarily displaced" to include displacement by domestic violence,<sup>102</sup> an important recognition of a special need for geographical flexibility even as states undermine that flexibility through the imposition of differential welfare benefits.

Those falling within the federal preferences category are arguably those most desperate for housing subsidies. There is room under the federal regulations for "ranking preferences," with which housing authorities may rank among federal preference holders, and for "local preferences."<sup>103</sup> A public housing authority's discretion in ranking its local preference category poses the greatest obstacle to poor persons seeking to move out of poverty.

Specifically, housing authorities may use residency as a local preference.<sup>104</sup> "Residence" includes working in, or being hired to

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ING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION FOR FY 1993, [hereinafter, MTO NOFA] 58 Fed. Reg. 43458, 43460 (1993).

98. 102. See 42 U.S.C. § 1437f(r)(1) (1988 & Supp. V 1993) (allowing use of a housing certificate or voucher anywhere within the state, or within the same or contiguous metropolitan statistical area as that containing the base housing authority).

99. Pub. L. No. 102-550, § 112, 106 Stat. 3689 (1992) (amending 42 U.S.C. § 1437d(c)(4)(A)(i) (1988 & Supp. V 1993) from seventy to fifty percent).

100. 42 U.S.C. § 1437f(d)(1)(A)(i) (1988 & Supp. V 1993); 59 Fed. Reg. 36686 (1994) (to be codified at 24 C.F.R. § 982.207(b)(1)).

101. 42 U.S.C. § 1437d(c)(4)(A)(i) (1988 & Supp. V 1993) (preferences for public housing); 42 U.S.C. § 1437f(d)(1)(A)(i) (1994) (preferences for tenant-based subsidies). For a description of the federal preference system, see Stanley Herr and Stephen Pincus, *A Way to Go Home: Supportive Housing and Housing Assistance Preferences for the Homeless*, 23 STETSON L.REV. 345 (1994).

102. See, e.g., 24 C.F.R. § 982.211 (b)(4) (1994), 59 Fed. Reg. 36688 (1994) (for the certificate and voucher programs).

103. See, e.g., 24 C.F.R. § 982.207(a)(3) (1994), 59 Fed. Reg. 36686 (1994).

104. See 24 C.F.R. § 982.208(f), 59 Fed. Reg. 36671 (1994) (allowing a local or ranking preference for residents within the housing authority's jurisdiction for the certificate and voucher programs); 24 C.F.R. § 960.204(d)(3) (1994) (allowing use of residence as a local preference for admission to public housing programs).

work in, the jurisdiction.<sup>105</sup> Historically, housing authorities have used their option for preferential treatment for persons already residing within the jurisdiction as a screen against in-migration of minority tenants.<sup>106</sup>

Housing authorities may already use a local preference to screen for higher income applicants for public housing admission and are indeed required to vary those admissions by income;<sup>107</sup> they may not do so for the certificate and voucher programs.<sup>108</sup> Recently finalized preference regulations demonstrate that housing authorities may use their local preferences to select applicants who are employed.<sup>109</sup> The New York City Housing Authority has already announced its intention to devote its full allotment of local preferences for public housing to families with working members.<sup>110</sup> Even if no discriminatory screening is used, the simple operation of local preferences may allow housing authorities to select from their

105. See, e.g., 24 C.F.R. Sec. 982.208(d) (1994), 59 Fed. Reg. 36687 (1994) (employment within the jurisdiction to be considered as residence for purposes of the local residency preference).

106. See PHILIP TEGELER, MICHAEL HANLEY, AND JUDITH LIBEN, TRANSFORMING SECTION 8 INTO A REGIONAL HOUSING MOBILITY PROGRAM 9 (Oct. 1994) (citing residency preferences as most significant impediment to mobility of minority tenants); PETERSON AND WILLIAMS *supra* note 7 at 15; Fred Freiberg, *Promoting Residential Integration: The Role of Private Fair Housing Groups*, in HOUSING MARKETS AND RESIDENTIAL MOBILITY 219, 228 (G. Thomas Kingsley and Margery A. Turner eds., 1993) (describing white suburb of Milwaukee which used residency preferences to exclude black applicants from gaining access to any form of subsidized housing). See also *Comer v. Cisneros*, 37 F.3d 775, 784 (2d Cir. 1994) (summarizing plaintiffs' claim that housing authority uses residency preferences to prevent the movement of minorities to the suburbs).

107. See 42 U.S.C. § 1437d(c)(4)(A)(iv) (1988 & Supp. V 1993) (requiring the public housing agency to employ waiting list selection criteria which will ensure the inclusion within public housing of families "... with a broad range of incomes. . ."); 24 C.F.R. § 960.211(d) (1994), 59 Fed. Reg. 36657 (1994).

108. See 24 C.F.R. § 982.210(b)(3)(iv) (1994), 59 Fed. Reg. 36687 (1994).

109. See 60 Fed. Reg. 3646 (1995) (announcing amendment of the U.S. Housing Act of 1937 to allow local preferences during fiscal year 1995 for families with employed members); S. REP. NO. 311, 103d Cong., 2d Sess. 27 (1994) (amending the United States Housing Act of 1937 to add to the public housing and certificate preference sections, Sections 6 and 8, "(V) assisting families that include one or more adult members who are employed" [to be codified at 42 U.S.C. § 1437d(c)(4)(A)(ii)(V), and 42 U.S.C. § 1437f(c)(4)(A)(ii)(V)]). See also 24 C.F.R. § 960.205(a)(1994), 59 Fed. Reg. 36656 (1994) (allowing use of employment as a local or ranking preference for public housing admission); 24 CFR § 982.210(b)(iv) (1994), 59 Fed. Reg. 36687 (1994) (allowance of of ranking preference for working families for voucher/certificate programs).

110. See Shawn G. Kennedy, *Housing Projects to Give Priority to the Employed*, N.Y. TIMES, Feb. 4, 1995, at A1. (describing New York City Housing Authority's intention to give working families preference for up to 50% of public housing vacancies).

waiting lists for the very characteristics that poor people have been denied the mobility to achieve: employment, income and residency in a more desirable place.

## B. Mobility Strategies—The Problems of “Unassisted” Mobility

The original “mobility” strategies, the use of tenant-based subsidies to move individuals out of concentrations of poverty and race, share three characteristics. First, they emerge as particular remedies in litigation, and thus are not subject to any standardized national norms.<sup>111</sup> Second, they share the specific goal of remedying concentration by race,<sup>112</sup> and third, they include housing counseling components.<sup>113</sup> The Moving to Opportunity (“MTO”) program differs somewhat in approach, but shares many of the same characteristics. While the MTO program directs its participants’ housing search toward areas of low concentration of poverty, rather than of low concentration of race,<sup>114</sup> it still emphasizes individualized housing counseling, placement and follow-up.<sup>115</sup>

The design of all housing mobility programs recognizes that active assistance in expanding prospective tenants’ geographical choices is critical to fulfilling the goals of mobility. Unless they receive advice in the apartment-hunting process, certificate or voucher holders who live in areas hyper-segregated by race or class tend to stay in them. Factors inherent in, and external to, housing administration conspire to produce this result.

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111. See PETERSON AND WILLIAMS, *supra* note 7 at 21.

112. See U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, 1 URBAN POLICY BRIEF 5 (1994) (comparing racial de-segregation emphasis of the Gautreaux mobility program with the anti-poverty agenda of the national demonstration “Moving to Opportunity” program).

113. See, e.g., *Gautreaux Assisted Housing Program*, *supra* note 100 at 243, 246 (describing counseling components of present Gautreaux program as including assistance in locating housing, approaching landlords, and reviewing housekeeping practices and credit histories to guarantee easier accommodation with landlords).

114. See MTO NOFA, 58 Fed. Reg. 43458-9 (1993).

115. *Id.* at 43465-6 (describing how non-profit organizations, the primary service providers under the MTO program, must be prepared to recruit landlords, to perform credit and house-keeping checks on MTO participant families, to drive families to low-poverty census tracts to familiarize them with the neighborhoods and show them rental units, and to provide on-going counseling once families have moved); JUDITH D. FEINS, MARY JOEL HOLIN, ANTONY A. PHIPPS, MTO - MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION: PROGRAM OPERATIONS MANUAL [*hereinafter*, “MTO Manual”] at 10-4 to 10-8 (July 1994) (elaborating on NOFA instructions concerning home visits to check housekeeping and obtain information for credit checks and to ascertain families’ goals); *id.* at 11-9 to 11-13 (describing ways in which counseling organizations can assist families in their housing searches).

The regulations governing "portability," the feature of geographical mobility basic to all tenant-based subsidies, extol but provide little real incentive for housing authorities to promote it. Housing authorities are encouraged, but not required, to ease mobility by cooperating with other housing authorities.<sup>116</sup> Housing authorities with voucher programs must accept tenants with vouchers from another program.<sup>117</sup> But while the "sending" housing authority will keep funding for the moving tenant's voucher under its Annual Contributions Contract with HUD, it must reimburse the "receiving" housing authority for 80% of its own administrative fee.<sup>118</sup> Housing authorities may also suffer loss of some of their local preference allocation by sending tenants who are subsidized without benefit of a federal preference.<sup>119</sup>

Historically, housing authorities have shown passive recalcitrance in informing tenants of the availability of mobility options. Certificate holders are supposed to be briefed as to the "full range of neighborhoods" available for their housing search.<sup>120</sup> Despite the eligibility of public housing tenants for federal preferences for tenant-based subsidies,<sup>121</sup> housing authorities allegedly misinform tenants of that option and discourage them from applying.<sup>122</sup>

Faced with these many passive barriers to mobility, tenants in neighborhoods hyper-segregated by race or class are unlikely to move out of them. The final reason for immobility is historical. One of the many vestiges of residential segregation is the deprivation of information about housing opportunities outside the neighborhood. The lack of information hinders subsidy holders in the housing search, and contributes to any reluctance to move. Several

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116. See 24 C.F.R. § 882.103(c)(3,4) (1994) (encouraging inter-public housing authority cooperation for mobility for Section 8 certificate holders); 24 C.F.R. § 887.555(a) (1994) (suggesting regional cooperation for the voucher program).

117. 24 C.F.R. § 887.565(a) (1994).

118. 24 C.F.R. § 887.563(e-f) (1994).

119. A public housing authority that sends a family not qualified under a federal preference will have that family count against its annual 10% local preference limit for certificate and voucher holders, while the receiving public housing authority will not be similarly penalized. 59 Fed. Reg. 36686 (1994) (to be codified at 24 C.F.R. § 982.207 (b)(3)).

120. 24 C.F.R. § 882.209(c)(3) (1994).

121. See 42 U.S.C. § 1437f(d)(1)(A)(i) (1988 & Supp. V 1993) (forbidding denial of tenant-based assistance to persons qualified for a federal preference solely because of their status as residents in public housing).

122. See *Thompson v. HUD*, Civ. Action No. 95-309, Complaint at 32 (D.Md. 1995) (alleging that public housing residents are discouraged from applying for tenant-based subsidies).



commentators have described this phenomenon.<sup>123</sup> It is clear that, without active intervention in the process of the housing search, mobility strategies will be frustrated by the very forces that they are designed to overcome.

#### IV. Conclusion

When asked at her first orientation session to describe her feelings about being enrolled in the MTO program, one participant commented on the images of violent opposition broadcast in television coverage of community meetings. She noted the intensity of the expressions of hatred for people like her, based solely on assumptions drawn about characteristics of people who live in the city. When she moved into a suburban county, she planned to show her new neighbors that the real issue was "not where you live, but how you live."<sup>124</sup>

The issue is, indeed, whether the "how" is determined by the "where". Poor people have become strangers in their own homes, disowned as fellow citizens of the polity by their own neighbors; how much more, then, are they to be discounted and distrusted when they cross boundaries expressed in terms of geography but created by forces of race and class. Against these trends, housing mobility strategies stand almost deserted, as lonely remnants of a policy of concern for the poorest of the poor, and of a philosophy based on mobility as a source of hope, not fear. New welfare and housing policies use triage as an excuse to target women such as the participant in the MTO orientation, whose initiative in breaking barriers threatens the social order. The successful resurgence of such policies shows that moving targets may be the easiest ones to hit.

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123. See PETERSON AND WILLIAMS, *supra* note 6, at 18-19; *Gautreaux Assisted Housing*, *supra* note 100 at 249); Rubinowitz, *supra* note 88 at 621 (1992) (describing initial responses to Gautreaux program as adverse to the idea of moving away from familiar neighborhoods).

124. Orientation session for Moving to Opportunity Participants, Offices of the Community Assistance Network, Baltimore, Maryland (Dec. 7, 1994) (notes on file with author).

